Filed 4/25/06 In re Elizabeth C. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re Elizabeth C. et al., Persons Coming Under the Juvenile Court Law.	B184759
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. TERESA M., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK47879)

Appeal from orders of the Superior Court of Los Angeles County, Stephen Marpet, Referee. Affirmed.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Jerry M. Curtis, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Teresa M. appeals from the juvenile court orders that (1) denied her petition under Welfare and Institutions Code[1] section 388 to reinstitute reunification services, and (2) terminated her parental rights to four children, E. (age 5), twins A. and J. (age 4), and O. (age 2). (§ 366.26.) We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

E., A., and J. were detained in March 2002 when E. was one year and the twins were five months old after the Department of Children and Family Services (the Department) received a referral from the child protection hotline alleging that Teresa was absent or unable to care for them. The Department learned that Teresa was hospitalized with psychosis and suicidal ideation. She had been hospitalized before. This time, Teresa had become increasing hostile, delusional and paranoid at home. She was presented as fearful, teary eyed, suspicious, selectively mute, and mumbling to herself. She was admitted because she posed a danger to herself and others and was unable to care for herself or others. Teresa and father Oscar C. had separated because of "domestic violence."

In April 2002, the juvenile court sustained a petition declaring the children dependents of the court under section 300, subdivision (b). The juvenile court removed the children from their parents' custody and placed them in foster care. The court ordered family reunification services for Teresa to include individual counseling to address parenting issues, stress, and domestic violence. Teresa was also ordered to take her medication. The court ordered Teresa monitored visits in a neutral setting.

a. *The six-month review period (§ 366.21, subd. (e)).*

In the summer of 2002, Teresa completed her parenting education program and was participating in a support group for victims of domestic violence. Teresa was experiencing postpartum depression, but had made some improvement in managing her symptoms. Her therapist reported that Teresa had several serious challenges that placed

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1 All statutory references are to the Welfare and Institutions Code.

her at risk of delaying the reunification of her family. Teresa did maintain consistent visits with her children once a week.

In October 2002, the Department reported that Teresa's mental condition had worsened. She was not taking her medication and had missed her previous two therapy sessions. The maternal grandmother explained that Teresa was acting strangely, refused to eat or drink, spent most of her time staring at pictures of her children, and spoke to herself. Teresa was re-admitted to the hospital for five days at the end of October. Although Teresa visited the children in November 2002, she did nothing during visits except stare at them for hours, or hug and kiss them. When a child cried, she would not react.

At the six-month review hearing in November 2002, the court found that Teresa was in partial compliance with the case plan, but that the children could not be returned to her and that there existed no substantial probability they could in the next six months. The court extended the requirement that Teresa's visits with the children be monitored. The children were placed with Oscar.

b. *The 12-month review period (§ 366.21, subd. (f)).*

Teresa gave birth to O. in December 2002 and was re-hospitalized for the second half of that month. The doctor diagnosed Teresa as suffering from major, recurrent, depression with psychotic features. Teresa gradually began to improve and after adjustments of her anti-psychotic medication, she was released on the 17th day of hospitalization.

Three days after his birth, the Department detained O. and placed the child with father. Informed of O.'s detention, Teresa did not show any emotion, appeared confused, and her speech was very limited.

The juvenile court sustained a petition in February 2003, declaring O. a dependent of the court under section 300, subdivisions (b) and (j). The court ordered reunification services for Teresa and O. matching those for Teresa and the older children. The court granted Teresa visits of twice a week in a neutral setting.

Teresa was arrested in January 2003 for creating a disturbance during a visit with the children by hitting father and exchanging blows with the paternal aunt. Thereafter,

Teresa's once-per-week visits occurred with the maternal grandmother at the social worker's office. The social worker reported that overall, the visits "were fine," but Teresa was "helpless trying to be attentive with all of [her children]." She required prompting and direction from the maternal grandmother.

In May 2003, Oscar, who had been successfully caring for the children, was seriously injured in an automobile accident. He was in a coma until December 2003, when he passed away. The paternal grandmother assumed responsibility for the children.

Meanwhile, the Department reported that Teresa was undergoing psychiatric counseling, cooperated moderately in individual counseling, and inconsistently attended a domestic violence group. She demonstrated some improvement in her ability to manage her symptoms and stabilize her mood. However, she was unable to maintain appropriate familial relationships.

At the review hearing for E., A., and J. in May 2003, the court found Teresa was in compliance with the case plan, but that returning the children to her would likely result in harm to them. The court extended services for six more months. Teresa ceased taking her medication in July 2003 after her MediCal had been terminated because she did not have the money to buy it or pay for her psychiatrist. Her domestic violence counselor reported again that Teresa's participation was inconsistent, her disclosures were brief, and "it appears that she may not have a good understanding of the reasons her children were removed from her care." Teresa stopped attending that group entirely in August 2003.

Weekend visits continued, although Teresa missed some and problems arose during visits. Sometimes Teresa failed to appear without canceling. In July, Teresa departed a visit without letting the monitor know, leaving all four children (who were under the age of five) unattended in the back yard with a gate to the alley open. In November 2003, the maternal grandmother reported that Teresa appeared distracted and did not pay "much" attention to the children during visits. Teresa had to be reminded to feed the children and would become upset when she was asked to clean up after them. Consequently, the Department recommended that reunification services for Teresa be terminated.

Teresa did not complete her case plan by January 2004. She experienced problems managing difficult situations with her therapist and in receiving direction. Her therapist recommended that Teresa continue treatment.

Still, Teresa slowly began to improve. Three months later, her psychiatrist reported that Teresa was cooperative and pleasant and was no longer in need of medication. The doctor saw no reason Teresa could not take care of her children. Her individual therapist stated that Teresa no longer needed to continue counseling treatment and she had stopped treatment in January 2004.

Meanwhile, Teresa appeared overwhelmed by the children's demands during visits. Attempting to please all of the children made her anxious and confused her. When she focused her attention on one child, she would forget the rest. She "appear[ed] to lack parenting skills." Teresa had no plan for caring for the children. She was unemployed and did not have a place of her own. The maternal grandmother's house was inappropriate for the children as it had no roof and only one bathroom.

At the 18-month review hearing in March 2004, the juvenile court found that the children could not be returned to Teresa's physical custody and there existed no substantial probability they would be returned within six months. The court terminated Teresa's reunification services and ordered the children into long-term foster care with the maternal aunt, Angelica P. It permitted Teresa to reside in Angelica P.'s home with the children and to have unmonitored contact with them in the home, but monitored contact outside. There is no indication that Teresa filed a petition for extraordinary writ review. (Cal. Rules of Court, rule 38.1.)

d. *The post-reunification period*.

For the first three months, Teresa complied with the visitation plan. However, by July 2004, Teresa had moved in with a man and ceased visiting the children for two weeks. She was not always reliable in her visits. After a month without visiting the children, Teresa and the Department arranged for three visits per week, for an hour each time, rather than the four-hour visits in the past. Conflicts between Angelica P. and Teresa surfaced. Then in the middle of December 2004, Teresa announced that she would not visit for a week.

During the first three months of 2005, although Teresa appeared more stable and self-confident, she visited the children only "partially" because of her pregnancy and because of conflicts she had with Angelica P. Teresa resumed visits after her newest child was born.

In January 2005, the Department completed adoption assessments for all four dependents (§ 366.21, subd. (i)) identifying adoption by maternal aunt Angelica P. to be the best permanency choice for them. Angelica P. confirmed her desire to adopt the four children or become their legal guardian. The Department observed that Angelica P. had provided the children with appropriate care and supervision, assured that they fully participated in day care programs, and found prompt medical treatment when needed. Teresa was opposed to this plan as she desired to reunify. In March 2005, finding again that the children would likely be severely harmed if returned to Teresa's custody, the court scheduled a selection and implementation hearing (§ 366.26) for July 26, 2005, and ordered Teresa to appear.

e. *The selection and implementation hearing (§ 366.26).*

At the section 366.26 hearing on July 26, 2005, Teresa's counsel requested a contest. The court asked for an offer of proof about what Teresa would testify to concerning visitation. Counsel responded that "notwithstanding any offer of proof I'm going to make, notice in this case is improper" because neither Teresa nor her counsel had received the Department's section 366.26 report until the day of the hearing, even though they were entitled to receive that report at least ten days beforehand. The juvenile court found Teresa had suffered no prejudice. The court explained why there was nothing about Teresa's visits that would trigger the exception to adoption found in section 366.26, subdivision (c)(1)(A). Still, the court continued the hearing for two days.[2]

At the continued hearing, Teresa filed a petition for modification under section 388 seeking to set aside the order setting the section 366.26 hearing, to reinstate reunification services, and to liberalize visitation with the goal of returning the children to

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[2] Teresa's attorney also filed written objections concerning the untimely service of the report.

her. Without holding a hearing, the court denied the petition because it failed to show any change of circumstances and was not in the children's best interest.

Teresa's counsel then repeated his objection that Teresa was entitled to a full ten-day continuance. The court responded "I disagree with you. . . . [T]he issues before this court have been here and have been involved, and mother knew all of these issues, and at this point, I don't think it was onerous for counsel of your magnitude to be able to prepare yourself and be ready to go forward, and frankly, gamesmanship at this time doesn't appear to be appropriate . . . ." The court noted that no prejudice was shown because Teresa's visits had remained supervised. Teresa offered no witnesses. The court found the children were clearly adoptable and terminated parental rights. Teresa appealed.

CONTENTIONS

Teresa contends the trial court erred in summarily denying her section 388 petition and in refusing to provide a ten-day continuance of the section 366.26 hearing.

DISCUSSION

1. *The trial court did not err in denying Teresa's section 388 petition without holding a hearing.*

Pursuant to section 388, a parent may petition the court to set aside, change or modify a previous order. "*The petition shall be verified . . . and shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction.* [¶] . . . [¶] *If it appears that the best interests of the child may be promoted by the proposed change of order . . . or termination of jurisdiction, the court shall order that a hearing be held . . . .*" (Italics added.)

"The parent need only allege a prima facie case in order to trigger the right to proceed by way of a full hearing. [Citation.] If the petition discloses that a hearing would promote the best interests of the child, the court will order the hearing. [Citation.] The petition must be liberally construed in favor of its sufficiency. [Citations.]" (*In re Edward H.* (1996) 43 Cal.App.4th 584, 592.) Hence, if the petition shows *any evidence* that a hearing would promote the best interests of the child, the court must order a

hearing. (*In re Aljamie D*. (2000) 84 Cal.App.4th 424, 432.) "The court may deny the application ex parte only if the petition fails to state a change of circumstance or new evidence that even *might* require a change of order or termination of jurisdiction. [Citations.]" (*In re Angel B*. (2002) 97 Cal.App.4th 454, 461, original italics.) We review a summary denial of a hearing and petition for abuse of discretion. (*In re Anthony W*. (2001) 87 Cal.App.4th 246, 250.)

Applying these principles, we hold that the juvenile court did not abuse its discretion in denying Teresa a hearing on her petition. Teresa failed to demonstrate a change in circumstances. (§ 388.) The July 2005 petition avers that she was living with Angelica P. and the children "*for a substantial amount of time* and I *was providing* full time care for them . . . ." (Italics added.) The very language of the petition demonstrates that it represents no *change* from the last time the court reviewed this case when she also was living with Angelica P. Teresa also averred that she was recently evaluated by the Kedren Community Mental Health Center to demonstrate that she is no longer in need of services from them and that nothing prevents her from caring for her children. However, these facts had also been before the juvenile court for at least 18 months. In January 2004, the Department reported that Teresa's therapist at the very same mental health center stated that Teresa no longer needed counseling and her psychiatrist stated she no longer needed psychotropic medication.

Teresa also asserted that she has since had a child who has not been removed from her care and she has been living with her boyfriend who supports her, suggesting she could care for the older three as well. Yet, the record shows repeatedly that Teresa was never able to attend to more than one child at a time. The record is replete with references to Teresa's failure to connect with or attend to the children and inability to appropriately care for them without constant reminders. That Teresa could care for her single newborn without Departmental intervention is not evidence that she is able now to care for more than one child, let alone *five*. Indeed, Teresa presented no evidence to challenge the juvenile court's repeated finding since November 2002, that the return of the children to her would likely result in severe harm to them. That omission completely undermines her assertion that she can care for her children safely.

Apart from whether Teresa demonstrated a change in circumstances or new evidence, she has not shown that return of the children to her would be in their best interests. To show best interests, Teresa stated that "Mother is not a risk to her children and has a newborn in her care without DCFS intervention and the children have a strong bond to mother and wish to be in her home." Teresa presented no evidence demonstrating that she is bonded with the children, that they wish to be with her, or that anyone has determined that she is not a risk to them. She made no showing to contradict the juvenile court's repeated finding to the contrary.

Finally, nothing would have been gained had the court scheduled a full hearing here, Teresa's contention to the contrary notwithstanding. The crucial question was whether the best interests of the children might be promoted by the proposed change of order (§ 388), here the reinstitution of reunification services. At the point of these proceedings – the commencement of the section 366.26 permanency planning hearing – "the children's interest in stability was the court's foremost concern and outweighed any interest in reunification. [Citation.]" (*In re Edward H., supra*, 43 Cal.App.4th at p. 594.) The prospect of an additional six months of reunification to see whether Teresa might be able to care for the children safely would not have promoted stability for the children and thus would not promote their best interests.

2. *The two-day continuance of the selection and implementation hearing was reasonable and Teresa was not prejudiced thereby.*

Teresa contends that the juvenile court erred in denying her second continuance of the section 366.26 hearing because the Department failed to provide her with its report for that hearing at least ten days in advance. Recognizing that the court gave her a two-day continuance, she argues she did not have sufficient time to read it and marshal her evidence.

Section 366.05 provides, "Notwithstanding subdivision (c) of Section 366.21 . . . any supplemental report filed in connection with a status review hearing held pursuant to subdivision (a) of Section 366 shall be provided to the parent . . . and to counsel for the child at least ten calendar days prior to the hearing." If the report is not provided in that time, "[t]he court shall grant a *reasonable continuance*, not to exceed 10 calendar days,"

unless the party waives this requirement "or the court finds that the party's ability to proceed at the hearing is not prejudiced by the lack of timely service of the report. . . ." The statute makes this prejudice presumptive, which may be rebutted by a finding of clear and convincing evidence to the contrary. (§ 366.05, italics added.)

Here, the juvenile court granted a continuance of two days. We conclude that that continuance was reasonable and that Teresa was not otherwise prejudiced.

Section 366.26 and California Rules of Court, rule 1463(c) require that *an adoption assessment be made pursuant to section 366.21, subdivision (i).* That assessment was *completed in this case on January 20, 2005, six months before the hearing.* Teresa does not claim that she did not receive the January adoption assessment, or was somehow unable to review it over the course of the four months after the court set the section 366.26 hearing.

Although the Department did not provide Teresa with the report it did prepare for the section 366.26 hearing at least ten days in advance of that hearing, that report is not the adoption assessment mandated by California Rules of Court, rule 1463(c) to be served at least ten days in advance of the section 366.26 hearing.[3] More important, Teresa was granted a two-day continuance to review the new report, which in this case was sufficient time for her to prepare her case. At issue in the section 366.26 hearing was the children's adoptability. (§ 366.26, subd. (c)(1).) The facts of adoptability were fully contained in the Department's January adoption assessment and the July report contained no new information, other than details about the children's medical check-ups and a refusal of the

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3 California Rules of Court, rule 1463(c) reads: "Before the [section 366.26] hearing, petitioner must prepare an *assessment under section 366.21(i)* [i.e., the adoption assessment]. At least 10 calendar days before the hearing the petitioner must file the assessment, provide copies to the parent . . . and all counsel of record." (Italics added.) Given rule 1463(c) mandates provision of the adoption assessment to the parent and counsel at least ten days before the hearing, Teresa's reliance on rule 1463(c) is unavailing. As noted, the adoption assessment was completed six months before the section 366.26 hearing.

medical health center to enroll Teresa. Everything else could be found in the review reports filed over the course of this long dependency, *all of which Teresa had received*.[4]

The only other issue at the section 366.26 hearing was whether Teresa could demonstrate applicability of an exception to adoption under one of the five enumerated exceptions. (§ 366.26, subd. (c)(1).) Yet, the contents of the Department's report would not address exceptions to adoption, as Teresa bore the burden of proof in that area. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1334.) While Teresa argues on appeal that she could have brought in information to challenge the reports' descriptions of her visits with the children, *there was no need for Teresa to wait for the adoption assessment report to build her case for an exception to adoptability*; she had at least four months' time in which to do that. In short, the two day continuance was "reasonable" time for Teresa to review what was effectively an update with little pertinent new information. (§ 366.05.)

Teresa relies on *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535 (*Judith P.*), to contend that anything short of a ten-day continuance was reversible per se. In *Judith P.*, this appellate division held that the requirement of section 366.21, subdivision (c) to provide the parents with a copy of the Department's status report at least ten days

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[4] Teresa cites numerous deficiencies in the section 366.26 report in an attempt to demonstrate that the court should have continued the hearing to enable her to attack those deficiencies. We perceive no such deficiencies. For example, she asserts the report provided no information as to the kind of relationship Teresa shared with her children. (§ 366.26, subd. (i)(2).) However, all of the reports prepared during the entire dependency contained this information. Teresa contends that the report contained no mention of the children's visits with their baby sister. At the time of the section 366.26 hearing, the baby was four months old, not old enough for the children to form any attachment to. She argues the report contained no mention of the children's feelings about their mother. Not only does Teresa's attorney appear not to even know whether the children were old enough to have an opinion, but the adoption assessment states that the children were too young to give a meaningful statement. (§ 366.21, subd. (i)(5).) Teresa contends the report is "deficient in terms of the caretaker's eligibility to adopt." But, the report describes in detail the aunt's qualifications to adopt these children. In any event, adoptability is not dependent on the presence of prospective adoptive parent. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) Finally, we note that where the Department carried the burden to demonstrate adoptability, a two-day continuance was ample time to enable Teresa and her counsel to compare the report's contents with the statutory requirements and point out these deficiencies to the court. Teresa, who did not bear the burden to show adoptability, was not required to marshal evidence on that score.

before the prepermanency planning hearing is mandatory and obligatory (*Judith P., supra,* at p. 549) because parents and children have an absolute right to review the report's contents to prepare for the status review hearing. (*Id*. at p. 553, fn. 12.) We explained that "[t]he cases are clear that the interests of the parent vis-à-vis the minor are stronger and the burden of proof is on [the Department], not the parent, at the prepermanency planning stage: there must be a finding that return to the parent would be detrimental to the child, and [the Department] bears that burden of proof." (*Id*. at p. 554, fn. 13.) Each hearing "during the pre-permanency-planning stage[] involves a time-limited attempt by a parent to improve enough to regain custody or at least to get additional reunification services." (*Id*. at p. 556.) The prepermanency planning hearing "is generally a party's last opportunity to litigate the issue of parental fitness as it relates to any subsequent termination of parental rights, or to seek the child's return to parental custody.' [Citation.]" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447.) For those reasons, the failure to provide the requisite ten days' notice of the contents of the status report is a structural error that implicates the fundamental fairness of the process, and is reversible per se. (*Judith P., supra,* at p. 558.)

Teresa's reliance on *Judith P*. is misplaced. That case involved the failure to provide the reports in advance of the prepermanency planning hearing under section 366.21. The service requirement in section 366.05 is applicable to all hearings *except* section 366.21. This dependency case has advanced well beyond the prepermanency planning hearing and so the provisions of section 366.05 apply allowing for "reasonable" continuances.[5]

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[5] If the juvenile court erred at all in failing to continue the hearing for an additional eight days, the error was trial-court, not structural. (*In* re *Angela C*. (2002) 99 Cal.App.4th 389, 395 [failure to give the parent notice of the continuation of the section 366.26 hearing was procedural, rather than structural, error where error did not implicate fundamental fairness or framework of trial, and where mother had notice and opportunity to be heard, and had received proper notice of the originally scheduled section 366.26 hearing].) Teresa had four months' notice of the hearing and had all of the reports that were prepared in advance of the hearing except the most recent update for which she received a two-day continuance, and had an opportunity to be heard.

In any event, this record reveals sufficient evidence to support the juvenile court's conclusion that Teresa was not prejudiced by the lack of timely service of the report. (See *In re Christiano S.* (1997) 58 Cal.App.4th 1424, 1431 [where the juvenile court must make a finding by clear and convincing evidence, we review the factual basis of finding for substantial evidence].) No question exists that these children are adoptable. The children are healthy and developing in an age appropriate manner. None of them has presented any emotional or mental problem. Angelica P., who wishes to adopt them, had long been providing these children with a stable, nurturing environment. Once the court finds adoption is likely and there is a previous ruling ending reunification services, termination of parental rights is relatively automatic absent proof that termination of adoption would be detrimental to the child's best interests under one of the exceptions to adoption found in section 366.26. (*In re Zacharia D., supra*, 6 Cal.4th at p. 447; *In re Lorenzo C., supra*, 54 Cal.App.4th at pp. 1341-1342.) The parent bears the burden of demonstrating this detriment. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.) The only applicable exception in this case is where the parent has maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(A).) The record here shows that Teresa's visits did not progress; she was granted unmonitored contact only if it occurred in the house. At times Teresa's visits were erratic. She never parented these children safely without constant supervision and prompting. There is no evidence that the children are bonded with her in any fashion. Thus, Teresa "stood no chance" of establishing the exception to adoption. (*In re Angela C., supra*, 99 Cal.App.4th at p. 396.) Sufficient evidence supports the juvenile court's finding, implicitly by clear and convincing evidence, that failing to grant an additional continuance was harmless to the claim that the exception to adoption applied.

DISPOSITION

The orders are affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.